ports make it important to determine by what law maritime liens are created and enforced. It seems clear that the creation of a lien must be governed by the law of the place where the vessel is situated when the services are rendered.[10] Thus if an English vessel is supplied with necessaries in an American or French port and libeled in the United States the materialman's lien is upheld.[11] Conversely it is submitted that for supplies furnished to an English vessel in an English port, no lien should be recognized even though the vessel were libeled in the United States.[12] The creation of liens for services on the high seas, as for seamen's wages, is on the same theory governed by the law of the ship's flag.[13] But though international comity requires that the creation of a lien by a foreign law be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libeled and sold.[14] Thus in a recent case where a Russian ship mortgaged in England was libeled and sold in Scotland, the law of the forum was applied and the English mortgagee preferred to an intervening Danish materialman.[15] *Constant* v. *Klompus*, 50 Scot. L. Rep. 27.

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STATE TAXATION OF INTERSTATE COMMERCE. — To what extent a state may tax property engaged in interstate commerce is still a troublesome question.[1] It is clear that a tax distinctly laid on commerce itself,

[10] The Scotia, *supra*; The Maud Carter, 29 Fed. 156. *Cf.* The Maggie Hammond, 9 Wall. (U. S.) 435. See WHARTON, CONFLICT OF LAWS, 3 ed., §§ 322, 358.

[11] The Scotia, *supra*. In England, however, whether or not the right is recognized, no jurisdiction is given to any court to enforce it.

[12] *Cf.* The Infanta, 13 Fed. Cas. No. 7030. Note that a French decision *contra* was regarded as erroneous but not void, as it was based on a mistake in English law. Castrique *v.* Imbrie, 4 H. L. Cas. 414.

[13] The Olga, 32 Fed. 329; The Velox *v.* Werke, 21 Fed. 479; The Angela Maria, 35 Fed. 430; The Belvidere, 90 Fed. 106. But *cf.* The Tagus, [1903] P. 44, where the law of the forum was applied and the master of a foreign ship given a maritime lien for wages for a series of voyages, although the law of the flag gave him one only for the last voyage. The explanation is probably that if a lien has ever existed, its "staleness" by analogy to statutes of limitations is to be determined by the law of the forum.

[14] Clark *v.* Hine, 45 Scot. L. Rep. 879; The Union, Lush. 128; The Selah, 40 Sawy. 40, 21 Fed. Cas. No. 12,636. *Cf.* Harrison *v.* Sherry, 5 Cranch (U. S.) 289. See The Scotia, 35 Fed. 907, 910; STORY, CONFLICT OF LAWS, §§ 323, 423 *b*.

[15] It might be contended that the essential nature of a maritime lien is that it gives a vested right superior to all prior non-maritime interests, and that to postpone it to a mortgage is to refuse to recognize its existence. But the foreign sovereign, though he may pass a valid title to a ship even in erroneous proceedings, as in Castrique *v.* Imbrie, *supra*, has not jurisdiction to give a qualified interest, which will forbid the sale of a ship in another forum later acquiring jurisdiction, or specify how the proceeds arising in that forum shall be distributed. Elsewhere the lien need only be regarded as giving such rights as the creating sovereign had jurisdiction to grant, namely, a claim against the vessel for which the sovereign of the forum may furnish such a remedy as he sees fit. It is submitted, however, that the only relief given a materialman in the English Admiralty Act is grossly inadequate.

[1] A state cannot levy a privilege tax on interstate commerce. Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. 635. Nor on interstate corporations as a condition of doing business. Pullman Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. 232. But if as a condition of doing local business, it is constitutional. Osborne *v.* Florida, 164 U. S. 650, 17 Sup. Ct. 214. A cab service operated by a railroad to carry inter-

as, for example, on freight as such or the gross receipts from the transportation, comes within the prohibition of the Constitution, although there is no discrimination in favor of intrastate commerce, and even though Congress has not acted.[2] Moreover property actually in the course of transit cannot then be taxed by the state;[3] and a state court has held that the length of time it remains within its borders is immaterial.[4] When, however, the property has completed the interstate trip, and is at rest awaiting sale, even in the original packages, it has come within the taxing jurisdiction of the state.[5] And the same result is reached when it is thus held over at an intermediate point.[6] If the property is at the place of shipment and awaiting transportation it is not yet in transit.[7] Moreover, if it has been started on an interstate journey and is stopped for a purpose not incidental or caused by the transportation it then becomes subject to state taxation.[8] Thus grain stopped *en route* for inspection and testing,[9] and cattle being fattened at an intermediate point,[10] were held taxable, although through bills of lading were outstanding. In accord with these cases a recent case has held that flour on an interstate transit stopped *en route* for repacking and blending is taxable by the state. *In re Holt and Co.*, 35 N. J. L. J. 307 (State Board of Equalization of Taxes).

A consideration of these authorities shows a general statement that a state cannot tax interstate commerce to be unsound. The important object of the interstate commerce clause was to prevent internal dissensions arising from attempts by a state to secure to itself undue advantages over other states by discriminatory regulations of commerce.[11] For this reason any tax, as shown above, which results either in state

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state passengers to and from its station is not interstate commerce, and is not exempt from a state privilege tax. State *ex rel.* Pennsylvania R. Co. *v.* Knight, 192 U. S. 21, 24 Sup. Ct. 202. This case seems to be argumentatively a step toward breaking down the distinction between privilege and property taxes in interstate commerce. See 21 HARV. L. REV. 618.

[2] Case of the State Freight Tax, 15 Wall. (U. S.) 232; Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 28 Sup. Ct. 638. But a tax on the gross receipts in lieu of all other taxes is constitutional. United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. 211.

[3] Kelley *v.* Rhoads, 188 U. S. 1, 23 Sup. Ct. 259.

[4] Coe *v.* Errol, 62 N. H. 303.

[5] Hinson *v.* Lott, 8 Wall. (U. S.) 148; Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. 1091.

[6] Pittsburg and Southern Coal Co. *v.* Bates, 156 U. S. 577, 15 Sup. Ct. 415. But it is still interstate commerce for the purpose of the Interstate Commerce Act of 1887. Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279.

[7] Coe *v.* Errol, 116 U. S. 517, 6 Sup. Ct. 475. *Contra*, Creamer *v.* Inhabitants of Bremen, 91 Me. 508, 40 Atl. 555. In Coe *v.* Errol, p. 525, Mr. Justice Bradley lays down the rule that goods are in interstate commerce "when actually started in the course of transportation to another state, or delivered to a carrier for such transportation." This *dictum* has been adopted as a test by the Supreme Court. See Railroad Commission of Ohio *v.* Worthington, 225 U. S. 101, 110, 32 Sup. Ct. 653, 656.

[8] General Oil Co. *v.* Crain, 209 U. S. 211, 28 Sup. Ct. 475; Diamond Match Co. *v.* Ontonagon, 188 U. S. 82, 23 Sup. Ct. 266.

[9] People *v.* Bacon, 243 Ill. 313, 90 N. E. 686.

[10] Waggoner *v.* Whaley, 21 Tex. Civ. App. 1, 50 S. W. 153. This line of cases goes beyond the rule of Mr. Justice Bradley in Coe *v.* Errol. See note 7, *supra*.

[11] See THE FEDERALIST, No. 7.

discrimination[12] or taxation of commerce as commerce is unconstitutional. But unless the tax does discriminate or is a tax on the commerce as such it is not to be assumed that the state has surrendered a sovereign power so essential to the life of a government. In spite of the language of the United States Supreme Court in some cases, it is submitted that a state tax on interstate commerce is constitutional if it does not fall within one of these two classes. In many cases where a tax on property in transit was assailed as a violation of the commerce clause the real question was whether the property had acquired a taxable *situs*.[13] When property is in a position to demand apparently permanent protection from a state it has acquired such a *situs*. The mere fact that a tax in return for that protection will indirectly affect interstate commerce should not render it unconstitutional. Property situated and used wholly within the state is admittedly not exempt because it is an instrument of interstate commerce.[14] In Pullman's Palace Car Co. *v.* Pennsylvania,[15] moreover, the United States Supreme Court expressly recognized that, a taxable *situs* having been acquired by a constant average of units remaining within a state, a state tax is not unconstitutional, although the units on which the tax was based were continually in interstate transit. Only a holding[16] that logs delayed in the course of an interstate transit for more than a year by low water are not taxable, is opposed to this theory; and to some extent the decision of the Supreme Court that sheep which took six weeks in transit across a state were not taxable.[17] But if the sheep had taken a much longer time, it is believed that the court could have upheld a state tax without departing from its former decisions. Such a result would be desirable practically and logically sound.

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Discrimination Resulting in a Financial Benefit to the State. — It is well settled that the maximum rates established by the legislature for the transportation of passengers by a common carrier must be reasonable and compensatory[1] and must not result in a denial of the equal protection of the laws. No statute is constitutional therefore which discriminates against a class arbitrarily chosen.[2] And if the discrimination is in favor of a class arbitrarily chosen it would seem that thereby the equal protection of the laws is taken from all those not

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[12] Woodruff *v.* Parham, 8 Wall. (U. S.) 123.

[13] Usually property in transit does not acquire a taxable *situs*. Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596; Conley *v.* Chedic, 7 Nev. 336.

[14] The Delaware R. Tax Case, 18 Wall. (U. S.) 206. See Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 5 Sup. Ct. 826, 829.

[15] 141 U. S. 18, 11 Sup. Ct. 876. Mr. Justice Bradley, who wrote the opinion in Coe *v.* Errol, note 7, *supra*, dissented.

[16] Coe *v.* Errol, 62 N. H. 303. The holding on this point was not appealed to the United States Supreme Court, but was cited with approval by Mr. Justice Bradley. See Coe *v.* Errol, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477.

[17] Kelley *v.* Rhoads, see note 3, *supra*. In this case the statute imposed the tax on sheep within the state "for the purpose of grazing."

[1] Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

[2] Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150, 159, 17 Sup. Ct. 255.